UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

Robert W. Keplinger,
Evelyn M. Keplinger,

Debtors.

Case No.: 00-12789
Chapter 7

Nathan M. Golberg, Trustee,

Plaintiff

vs.

Michael Such
d/b/a Security & Such,

Defendant.

Adv. Pro. No.: 00-90223

APPEARANCES:

Goldberg & Gottheim
Attorneys for the Trustee
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Nathan M. Goldberg, Esq.
Chapter 7 Trustee

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Dominick J. Brignola
Of Counsel

Hon. Robert E. Littlefield, Jr., United States Bankruptcy Judge

Memorandum, Decision & Order

The Chapter 7 Trustee ("Trustee") initiated this adversary proceeding seeking to recover a preferential transfer pursuant to 11 U.S.C. § 547.

Facts

The facts, derived from the stipulation of the parties, follow:

1. In January 1999 the Debtors ("Debtors") entered into a transaction with creditor Michael Such ("Defendant") whereby they became indebted to the Defendant in the amount of $4,128.50. In exchange the Debtors pledged a 5.1 carat diamond ring; the Defendant was unaware of any prior security interest in the ring.

2. On August 16, 1999, the Debtors handed to the Defendant two personal checks totaling $4,182.50. The Debtors requested that the Defendant hold them until there were sufficient funds in the account to cover them.

3. On October 15, 1999, the Defendant returned the ring to the Debtors so they could sell it and pay the debt; the Defendant had been unable to sell it.

4. On March 14, 2000, the Debtors delivered the ring to Northeastern Fine Jewelry; they received $25,847.00. Of these funds, $15,847.00 was applied to satisfy the Debtors account and $10,000.00 was given to the Debtors. This transaction is subject to a separate adversary proceeding initiated by the Trustee.

5. On March 15, 2000, the Debtors presented the Defendant with a Treasurer's check issued by Adirondack Trust Company for $4,128.50. On that date, the Defendant carried on his books an obligation due from Debtors in excess of that amount; he was also in possession of the two unnegotiated checks. The Defendant negotiated the bank check.

6. On May 17, 2000, the Debtors filed the instant Chapter 7 petition.

Arguments

The primary focus of contention is the nature of the bank check and whether its presentment constitutes a transfer. The Trustee relies upon *Barnhill v. Johnson*, 503 U.S. 393 (1992), arguing the transfer occurred when the bank check was negotiated in March 2000, within the preference period. The Defendant disagrees, arguing the bank check was merely a replacement for the checks he was holding since August 1999. He contends the conveyance occurred when he received the original (August 1999) checks.

Discussion

11 U.S.C. § 547 governs preferences and provides, in part,

> Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property –
>
> (l) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
>
> (3) made while the debtor was insolvent;
>
> (4) made –
>
> (A) on or within 90 days before the date of the filing of the petition: or ...
>
> (5) that enables such creditor to receive more than such creditor would receive if –
>
> (A) the case were a case under chapter 7 of this title;
>
> (B) the transfer had not been made; and
>
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

The Trustee has the burden of proving every element of a preference. *In re Lease-A-Fleet, Inc.*, 151 B.R. 341 (E.D. Pa. 1993); *In re Tire Kings of America, Inc.*, 164 B.R. 40 (M.D. Pa. 1993). The pleadings and stipulation of facts support a finding that the first three prongs are met but it is highly disputed that the transfer was made within 90 days of the filing. The court need not address this issue because no matter how it is resolved, the Trustee has failed to carry his burden of establishing the fifth prong of this section.

To demonstrate that the Defendant has received more than he should have the Trustee asserts, "By receipt of those funds, defendant received a sum larger than he would have received if he had to share the same with other unsecured creditors." (Trustee's Memorandum of Law p. 2.) However, he does not provide any factual analysis or legal support for his conclusion that the debt is unsecured[1] or that the Defendant received a disproportionate share. Moreover, the court is unable to make a determination, from an independent review of the file, that this Defendant has received more than it should.

When a trustee offers no evidence of claims filed or assets recovered, the trier of fact is unable to determine whether 11 U.S.C. § 547(a)(5) has been met. *In re Burdick*, 256 B.R. 837 (D. Mass. 2001). That is precisely this case. For this reason, the Trustee cannot establish a preference, and therefore, the complaint is dismissed.

Dated:
Albany, New York

Hon. Robert E. Littlefield, Jr.
United States Bankruptcy Judge

[1] In his Answer the Defendant denies he was an unsecured creditor and affirmatively argues the loan was secured by virtue of the collateral pledge.